STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to implement the provisions of Section 10a(1) of 2016 PA 341.	Case No. U-15801
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **ALGER DELTA COOPERATIVE ELECTRIC ASSOCIATION**.	Case No. U-18372
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **ALPENA POWER COMPANY**.	Case No. U-16086
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **BAYFIELD ELECTRIC COOPERATIVE**.	Case No. U-18373
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **CHERRYLAND ELECTRIC COOPERATIVE**.	Case No. U-18374
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **CLOVERLAND ELECTRIC COOPERATIVE**.	Case No. U-18375
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **CONSUMERS ENERGY COMPANY**.	Case No. U-16087

In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **DTE ELECTRIC COMPANY**.	Case No. U-16088
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **GREAT LAKES ENERGY COOPERATIVE**.	Case No. U-18376
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **INDIANA MICHIGAN POWER COMPANY**.	Case No. U-16090
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **HOMEWORKS TRI-COUNTY ELECTRIC COOPERATIVE**.	Case No. U-18377
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **MIDWEST ENERGY COOPERATIVE**.	Case No. U-18378
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **NORTHERN STATES POWER COMPANY-WISCONSIN**.	Case No. U-16091
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **THUMB ELECTRIC COOPERATIVE**.	Case No. U-18379

In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **UPPER PENINSULA POWER COMPANY**.	Case No. U-16092
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **UPPER MICHIGAN ENERGY RESOURCES CORPORATION**.	Case No. U-16093
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **WISCONSIN ELECTRIC POWER COMPANY**.	Case No. U-16094
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **PRESQUE ISLE ELECTRIC & GAS CO-OP**.	Case No. U-18388
In the matter, on the Commission's own motion, to establish a docket for the implementation of MCL 460.10a(1) by **ONTONAGON COUNTY RURAL ELECTRIFICATION ASSOCIATION**.	Case No. U-18389

At the June 15, 2017 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On December 21, 2016, Public Act 341 of 2016 (Act 341), an amendment to Public Act 3 of

1939; MCL 460.1 *et seq.*, was signed into law. Section 10a(1)(a) of Act 341, MCL 460.10a(1)(a), provides that the Commission shall issue orders establishing that "Except as otherwise provided in this section, provide that no more than 10% of an electric utility's average weather adjusted retail sales for the preceding calendar year may take service from an alternative electric supplier at any time." MCL 460.10a(1)(b)-(k) provide that the orders shall, among other things: (1) establish procedures necessary to allocate the amount of load that will be allowed to be served by alternative electric suppliers (AESs), (2) adjust the cap if less than 10% of an electric utility's average weather-adjusted retail sales for the preceding year is taking service from an AES, and (3) require an electric utility to annually file with the Commission a rank-ordered queue of all customers awaiting retail open access service under subdivision (g).

On March 10, 2017, the Commission issued an order in this docket inviting interested persons to submit comments on the updated procedures, previously adopted by the Commission on September 29, 2009, regarding the allocation of the amount of load to be served by AESs. The Commission received comments from Consumers Energy Company (Consumers) and reply comments from DTE Electric Company expressing agreement with Consumers' comments. No other comments or reply comments were received.

On April 28, 2017, the Commission issued an order in this docket (April 28 order), finding that Consumers' proposed amendments to the updated procedures attached to the March 10 order were reasonable and should be adopted. However, out of concern for the correct interpretation and implementation of the final sentence of MCL 460.10a(1)(c), which requires the Commission to reduce the cap for any electric utility serving fewer than 200,000 customers in Michigan if the utility has not had any load served by an AES in the preceding four years, the Commission invited interested persons to submit legal briefs. Specifically, the Commission

requested that the briefs address the question of whether the cap should immediately be adjusted for any of the applicable utilities on April 20, 2017, which will then remain in effect at that level for no more than two consecutive years, or whether the Commission should wait to adjust the choice cap based on choice participation during 2017 before implementing any required choice cap reduction during 2018.

The Commission Staff (Staff), the Association of Businesses Advocating Tariff Equity (ABATE), Energy Michigan, and Michigan Electric and Gas Association (MEGA) filed briefs on May 15, 2017. The Staff, ABATE, and MEGA filed reply briefs on May 26, 2017.

Commission Staff

In its brief, the Staff stated that it "refrains from supporting either option for implementation of this provision and expresses its support for the method the Commission will ultimately decide." Staff's brief, p. 2. However, the Staff did request that all utilities to which this provision applies continue to annually file with the Commission their respective choice participation data and the number of customers being served. In particular, the Staff requested, utilities should be required to file this information even when choice caps are set at 0% because it will create a clear and trackable history of choice participation for each utility to which this provision applies.

Association of Businesses Advocating Tariff Equity

According to ABATE, Indiana Michigan Power Company (I&M), a utility serving fewer than 200,000 customers in Michigan, is the only utility to which this statutory language applies.[1]

[1] In its reply brief, ABATE withdrew its argument that I&M is the only utility in Michigan to which MCL 460.10a(1)(c) applies, but asserted that its withdrawal does not have any substantive effect upon its comments.

ABATE noted that I&M's service territory is within the PJM Interconnection, LLC, which has "a unique history of choice participation." ABATE's brief, p. 2. ABATE averred that after the September 25, 2012 order in Case No. U-17032 (September 25 order), wherein the Commission established a state compensation mechanism (SCM) and set capacity rates at $588/megawatt/day for I&M's open access distribution customers, the electric choice load in I&M's service territory dropped to, and has remained at, 0%. ABATE argued that there is a lack of competition in I&M's service territory that is connected to the alleged "capacity" charge imposed on AESs under the SCM. *Id.*, p. 3. In ABATE's opinion, the last sentence of MCL 460.10a(1)(c) grants the Commission "the ability to ensure that the anti-competitive consequences of a prior capacity charge do not continue to thwart choice participation in I&M's service territory once a new more reasonable capacity charge is established." *Id.*, p. 6. ABATE also asserted that Section 6w(3) of Act 341; MCL 460.6w(3), excludes non-capacity related electric generation costs from the calculation of the capacity charges of other Michigan utilities, and therefore, the Commission should reexamine the SCM and capacity charge set in the September 25 order.

In response to the Commission's questions in the April 28 order, ABATE requested "that the Commission refrain from giving retroactive effect to the four-year trigger language contained in the last sentence of MCL 460.10a(1)(c)." ABATE's brief, p. 3. ABATE asserted that if a statute is to have retroactive effect, courts have required that the Legislature be clear about the retroactive application so as to avoid problems with unfairness. *Id.*, citing *LaFontaine Saline, Inc. v. Chrysler Group, LLC*, 496 Mich 26, 38-39; 852 NW2d 78, 85-86 (2014).

ABATE asserted that the trigger date should commence on April 20, 2017, the effective date of Act 341, and run forward four years. ABATE argued that the Legislature intended that April 20, 2017, be the four-year trigger date, so as to give interested parties in I&M's service

territory an opportunity to participate in electric choice service. In addition, ABATE asserted that, "Based on the plain language of MCL 460.10a(1)(c), it is clear that any adjustment of the cap below ten percent may not be in effect for more than 2 consecutive years," and that after the expiration of the two-year period, the cap reverts to 10%. ABATE's brief, p. 5.

The Staff agreed with ABATE that the plain language of Act 341 provides the Commission with discretion to adjust the cap in two years or less.

In its reply brief, MEGA noted that ABATE defined the term "preceding 4 years" as a four-year period that runs forward from April 20, 2017. MEGA asserted that such a definition is absurd, unjust, and contrary to the statute's plain meaning. MEGA argued that ABATE's interpretation creates a forward-looking, look-back period, which, in MEGA's opinion, is contradictory. According to MEGA, the language in MCL 460.10a(1)(c) is clear and unambiguous that the four-year time period at issue "must literally precede (occur before in time) April 20, 2017." MEGA's reply brief, p. 2.

In addition, MEGA disagreed with ABATE's and Energy Michigan's position that MCL 460.10a(1)(c) provides the Commission discretion over the duration of the cap adjustment. MEGA argued that if the Commission were to adopt ABATE's argument, there would be no minimum time period for the cap adjustment and "the Commission . . . could decide not to adjust the cap at all." MEGA's reply brief, p. 4. MEGA contended that the cap adjustment is mandatory and it would be inconsistent with the statutory language to provide the Commission with such discretion.

Energy Michigan

Similar to ABATE, Energy Michigan provided a history and overview of the electric choice load in the I&M service territory, and also noted that after the capacity charge was set in the

September 25 order, the electric choice load has been 0%. Energy Michigan asserted that "once a new capacity charge is put into place for I&M, there is potential for new customers to go to electric choice." Energy Michigan's brief, p. 3.

Energy Michigan acknowledged that in MCL 460.10a(1)(c) there is ambiguity about the date on which the cap should be adjusted, but asserted that it is clear that the statute does not mandate a two-year cap adjustment – it merely limits any cap adjustment to "no more than 2 consecutive calendar years." Energy Michigan's brief, pp. 2-3, citing MCL 460.10a(1)(c). Energy Michigan argued that the last sentence of MCL 460.10a(1)(c) is deliberately flexible in order to provide the Commission discretion to ensure that a previous capacity charge does not continue to suppress electric choice participation in I&M's service territory under a new capacity charge. The legislative intent, according to Energy Michigan, is that the cap be set for as long as the current capacity charge remains in place (up to two years), based on enrollment under the current charge, and that the adjusted cap is removed once a new capacity charge is set to allow I&M's customers to participate in the choice market under the new capacity charge. *Id.*, p. 4. Then, Energy Michigan asserted, the Commission may adjust the cap based on the new capacity charge, if necessary.

The Staff agreed with Energy Michigan "that the plain language of the statute allows the Commission the discretion to implement a cap of up to two years, but does not mandate a length of two years, prior to the cap reverting to the default 10%." Staff's reply brief, p. 3.

In its reply brief, MEGA asserted that there is no legislative intent in MCL 460.10a(1)(c) to end the cap adjustment when the capacity charge is adjusted. MEGA stated, "If the Legislature intended capacity charge changes to provide the trigger for ending the choice cap adjustment, the Legislature would have expressly done so. The Commission should not now read such

language into the Act where it does not exist." MEGA's reply brief, p. 7.

Michigan Electric and Gas Association

MEGA stated that pursuant to Michigan law, if the Legislature's intent is ambiguous, "the Commission must attempt to discern the Legislature's intent through a reasonable construction of the statute." MEGA's brief, p. 3. MEGA argued that it is problematic and unreasonable to interpret Act 341 as permitting the Commission to issue an order adjusting the cap in 2017, but making the cap effective in 2018. By way of example, MEGA asserted that the Commission might enter an order in June 2017 reducing a utility's choice cap effective January 1, 2018, but if a choice customer signs-up with a utility during the last six months of 2017, it could impact the analysis. In addition, MEGA stated, "although unlikely, an alternative electric supplier could arbitrage a utility's choice offerings in a manner that could undermine the statute by effectively blocking an adjustment in the cap." *Id.*, p. 5.

MEGA contended that the legislative intent regarding the definition of "year" in the last sentence of MCL 460.10a(1)(c) must be determined. MEGA noted that the Legislature used "calendar year" in some subsections, and "year" in others, and that the use of different terms suggests that the Legislature intended different definitions for the terms. MEGA stated that there is no question that "year" in MCL 460.10a(1)(c) should be quantified as 12 months, but argued that there is ambiguity about the date on which the preceding four-year period commences.

MEGA averred that the April 28 order incorrectly intimated that April 20, 2017, was the trigger date for the four-year period. According to MEGA, Section 10a(1) of Act 341; MCL 460.10a(1), directs the Commission to issue orders implementing the statute, and that it is "apparent that the Legislature intended 'preceding' to relate to the date of the orders Act 341

directed the Commission to issue rather than the date of Act 341 itself." MEGA's brief, p. 4. In MEGA's opinion, when the Commission issued the April 28 order, that date became the trigger for determining whether a utility has had any load served by an AES during the previous four years.

Next, MEGA asserted, if the adjustment is effective mid-year, the Commission must determine whether the adjustment is in place for a partial year, plus one calendar year or for a partial year, plus two calendar years. MEGA's brief, p. 5. MEGA argued that the appropriate interpretation is a partial calendar year plus one full calendar year. *Id*. MEGA explained that, "The statutory interpretation principle of *in pari materia* requires the Commission to read all three sentences of MCL 460.10a(1)(c) together, particularly when, as here, they were passed as one statutory scheme." MEGA's reply brief, p. 5. MEGA noted that the first sentence of MCL 460.10a(1)(c) states that the Commission will establish a cap that is equal to the utility's prior year sales to an AES, which is then set for the current year, plus five additional years, for a total of six years. MEGA stated that the third sentence applies to a specific type of utility, and in certain circumstances, the cap adjustment period is reduced from six years to two years. According to MEGA, when the first sentence is read in harmony with the third sentence, it is clear that the Legislature intended that the cap be designed to include the remainder of the current year, plus an additional year, for a total of "no more than 2 consecutive calendar years." *Id.*, p. 6.

The Staff agreed with MEGA that should the Commission decide to immediately adjust the cap, then the adjustment should be in place for one partial calendar year plus one full calendar year.

ABATE replied that although MEGA asserted that the cap must be set in terms of calendar

years, there is no provision that expressly states such. ABATE argued that the calendar year limitation only applies to the maximum duration of the cap, not the date on which it commences.

ABATE disagreed with MEGA's argument that the word "preceding" modifies the word "orders" in MCL 460.10a(1). According to ABATE, "the word 'preceding' modifies the phrase '4 years' not the word 'order' contained in a far removed sentence. Furthermore, it is the 4-year period that triggers the Commission's duty to adjust the cap, not the other way around." ABATE's reply brief, p. 2. ABATE reiterated that the Legislature did not expressly state that MCL 460.10a(1) would have retroactive effect, and therefore, the four-year period runs forward from April 20, 2017.

Discussion

On page 6 of the April 28 order, the Commission requested that interested parties submit briefs providing input on whether the choice cap should immediately be adjusted on April 20, 2017, for any utility serving fewer than 200,000 Michigan customers who has not had any load served by an AES in the preceding four years, which will then remain in effect at that level for no more than two consecutive years, or whether the Commission should wait to adjust the cap based on choice participation during 2017 before implementing any required choice cap reduction during 2018.

The Commission agrees with MEGA that it is problematic for the Commission to delay implementation of MCL 460.10a(1)(c) until 2018. As explained by MEGA, if the Commission were to issue an order before the conclusion of calendar year 2017, reducing a utility's choice cap effective January 1, 2018, a choice customer still has the ability to sign-up with the utility in 2017, and it would further complicate the analysis. In addition, based on a reasonable reading of MCL 460.10a(1)(c), there is no language that would permit the Commission to wait to adjust the

cap in 2018 based on choice participation during 2017.

The Commission agrees with MEGA that in order to determine the date on which the Commission should adjust the cap for utilities serving fewer than 200,000 Michigan customers, who have not had any load served by an AES in the preceding four years, the Commission must discern the Legislature's intent behind the phrase "the preceding 4 years" in MCL 460.10a(1)(c). In *Taylor v Currie*, 277 Mich App 85, 94; 743 NW2d 571, 577 (2007), the Michigan Court of Appeals stated, "If the language is ambiguous, this Court must strive to give effect to the intent of the Legislature by applying a reasonable construction, considering the purpose of the statute and the object it seeks to accomplish." The Commission notes that the Legislature used "calendar year" in some sentences of MCL 460.10a(1)(c), and "year" in others, and therefore, it is clear that the Legislature intended different definitions for the terms. Because the Legislature did not use "calendar year" in the phrase "preceding 4 years," the Commission finds that the word "years" does not refer to a calendar year, but to a 12-month period commencing on a specific date. Therefore, the Commission must determine the date on which the "preceding 4 years" commences.

The Commission disagrees with MEGA's interpretation that the April 28 order was the trigger date for the four-year period. As ABATE argued, the word "preceding" modifies the phrase "4 years," not the word "orders" contained in MCL 460.10a(1), which is far removed from Section 10a(1)(c). And, as stated by ABATE, it is the four-year period that triggers the Commission's duty to adjust the cap, not the issuance of an order under MCL 460.10a(1). Therefore, the Commission finds that the most reasonable interpretation of MCL 460.10a(1)(c) is that the trigger date is April 20, 2017, the effective date of Act 341, and that the preceding four-year period is April 20, 2013, to April 20, 2017.

The Commission disagrees with ABATE that an interpretation of the phrase "the preceding 4 years" as a four-year period from April 20, 2013, to April 20, 2017, is retroactive application of the statute. The Commission is not retroactively adjusting the choice cap to be effective on a date in the past. Instead, the Legislature requested that the Commission use the utilities' past weather-adjusted sales data to determine whether the choice cap should be adjusted on a future date.

The Commission agrees with MEGA that all three sentences of MCL 460.10a(1)(c) should be read together as one statutory scheme, and that the Legislature intended that the cap be designed to include the remainder of the current year, plus an additional year, for a total of "no more than 2 consecutive calendar years." The Commission finds that the most reasonable interpretation of "no more than 2 consecutive calendar years" is a partial calendar year plus one full calendar year. So, for example, if the Commission were to adjust the choice cap in July 2017, the cap would remain in place for the remainder of 2017, plus the full calendar year of 2018.

Finally, the Commission adopts the Staff's recommendation that all utilities continue to annually file with the Commission their preceding calendar year sales, their weather-adjusted retail sales for the preceding calendar year, the resulting cap with all supporting documentation necessary, and the number of customers being served, if applicable under MCL 460.10a(1)(c). All utilities serving fewer than 200,000 Michigan customers shall file this information even when choice caps are set at 0% because it will create a clear and trackable history of choice participation for each utility to which this provision applies.

THEREFORE, IT IS ORDERED that:

A. Pursuant to MCL 460.10a(1)(c), if a utility serving fewer than 200,000 Michigan customers has not had any load served by an alternative electric supplier during the four-year period of April 20, 2013, to April 20, 2017, the Commission shall issue an order adjusting its choice cap to 0%.

B. If the Commission adjusts, during a calendar year, the choice cap of a utility serving fewer than 200,000 Michigan customers who has not had any load served by an alternative electric supplier in the preceding four years, the cap shall be set for the remainder of that calendar year, plus an additional calendar year, for a total of "no more than 2 consecutive calendar years" pursuant to MCL 460.10a(1)(c), and the cap shall be reviewed after the February 1 annual choice cap filing.

C. On or before June 22, 2017, all utilities serving fewer than 200,000 Michigan customers pursuant to MCL 460.10a(1)(c) shall file in their assigned docket their preceding calendar year sales, their weather-adjusted sales for the preceding year, the resulting cap with all supporting documentation, and the number of customers currently served in Michigan.

D. All utilities shall continue to annually file in their assigned dockets their preceding calendar year sales, their weather-adjusted retail sales for the preceding calendar year, the resulting cap with all supporting documentation necessary, and for those utilities subject to the final sentence of MCL 460.10a(1)(c), the number of customers being served. This information shall be filed annually, even if electric choice caps are set at 0%.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Commission's Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Norman J. Saari, Commissioner

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Rachael A. Eubanks, Commissioner

By its action of June 15, 2017.

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Kavita Kale, Executive Secretary